

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

STEPHEN OMOGBEHIN, . Case No. 06-4581 (JEI)  
. .  
. .  
v. . 1 John F. Gerry Plaza  
. 4th & Cooper Streets  
. Camden, NJ 08101  
MARI CINO, Acting .  
Secretary, Department .  
of Transportation, .  
. .  
Defendant. .  
. . May 21, 2009  
. . 11:15 a.m.  
.....

TRANSCRIPT OF STATUS CONFERENCE  
BEFORE HONORABLE JOEL SCHNEIDER  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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1                   THE COURT: Good morning. Please be seated.  
2 We're on the record. This is the matter of -- excuse me  
3 if I mis-pronounce the name -- Omogbehin versus Cino, 06-  
4 4581. That's the docket number. Can we please have the  
5 entries of appearance starting with the plaintiff?

6                   MR. FRIEDMAN: Dennis L. Friedman, attorney for  
7 plaintiff.

8                   MS. SHELTON: Assistant United States Attorney  
9 Karen Shelton for the defendant.

10                  THE COURT: Okay. Counsel, we're here to  
11 address the letters I received from counsel on some case  
12 management issues. Mainly they involve, as the Court  
13 understands it, the service of plaintiff's expert report.  
14 The defendant has raised two issues. One is the  
15 timeliness of the service of the report, and more  
16 important, the substance of the report. With regard to  
17 the timeliness, Ms. Shelton, if you want to be heard I'll  
18 hear you, but if the report was only filed a day or two  
19 late there's does not appear to be prejudice as a result  
20 of the timing. I really don't think we need to spend much  
21 time on that issue, but I understand your objection is  
22 more to the substance and the nature of the content of the  
23 report, and we can deal with that. Do you want to be  
24 heard on the timing issue?

25                  MS. SHELTON: That's fine, Your Honor. It's

1 certainly within your discretion to decide whether or not  
2 to strike it for timeliness.

3 THE COURT: Okay. So, let's -- the Court's  
4 ruling on the timeliness issue is that -- we will deem the  
5 report to be timely served. But let's deal with the more  
6 important substantive issue. Here's the issue as I  
7 understand it. Ms. Shelton, it's your application?  
8 Correct me if I'm wrong.

9 MS. SHELTON: That's correct.

10 THE COURT: Your argument is that the Court had  
11 set a deadline to file a spoliation motion. That deadline  
12 passed. In effect what we have here is a spoliation  
13 expert report. And that's not an appropriate subject of  
14 expert testimony at the trial of this case. Is that a  
15 fair summary of your argument?

16 MS. SHELTON: Essentially, Your Honor. The  
17 expert report, in fact, sort of rehashes issues that were  
18 raised and addressed by this Court in a prior motion to  
19 compel and motion for reconsideration, and also raises the  
20 spoliation issue, so it's --

21 THE COURT: What about Mr. Friedman's argument  
22 that there were developments subsequent to the Court's  
23 rulings that are addressed in this expert report?

24 MS. SHELTON: I'm not sure in particular what

1 your -- it's in reference to, but if it's to the discovery  
2 that was produced at the end of discovery, frankly whether  
3 or not that could or should have been turned over sooner  
4 doesn't change the fact that plaintiff is now in  
5 possession of it and I see no reason why something that he  
6 possesses could -- I don't see how that could be the  
7 subject of the spoliation motion, which by its very nature  
8 would be evidence it's no longer in existence. But I  
9 don't dispute that we did produce some additional things  
10 at the very end of discovery. At the time we had an  
11 application to extend discovery pending so that I could  
12 address some things to determine whether or not they had  
13 been turned over.

14 There was a prior counsel in this case. I had  
15 some difficulty determining what had and hadn't been  
16 turned over because it had not been Bates stamped. I erred  
17 on the side of disclosure and turned over as much as I  
18 thought might not have been turned over prior, previously  
19 on the last day of discovery.

20 To the extent that Mr. Friedman believes these  
21 could have or should have been turned over sooner, or  
22 during the administrative proceedings, this isn't a rehash  
23 to the administrative proceedings. This is discovery that  
24 he requested and he's now received. I don't see how that  
25 is the subject of dispute, but perhaps he can speak to

1 what in particular his issue is with the discovery that  
2 was produced at the end of discovery.

3 THE COURT: I think we need to, at least the  
4 Court needs to understand better, and we'll discuss this  
5 in detail, what the purpose of this report is.

6 MS. SHELTON: Your Honor --

7 THE COURT: If the report is information --  
8 relevant information existed at one time that no longer  
9 exists, that's a spoliation issue. It's not clear to the  
10 Court what the purpose of this report is.

11 MS. SHELTON: Well, Your Honor, I read it both  
12 as being that, and I'm prepared to go through it section  
13 by section what his claim is, and how those issues have  
14 already been addressed by the Court in prior motions to  
15 compel.

16 THE COURT: Well, I think where we ought to  
17 start, let's now turn the floor to Mr. Friedman and get a  
18 better understanding of what the purpose of this report is  
19 because I'm not entirely clear whether it's spoliation or  
20 some other purpose. So, let's hear from Mr. Friedman now.  
21 What is the purpose of this expert report? And what are  
22 the conclusions in the report? And what do you want your  
23 expert to testify to at trial?

24 MR. FRIEDMAN: The purpose of the report is to  
25 identify, number one, Mr. Omogbehin, who was hired as an

1 IT expert, as an expert for trial purposes. He would be  
2 testifying to matters which may not be in within the  
3 purview --

4 THE COURT: Okay. Let's get over that. I'm  
5 more worried about the substance of the testimony. What  
6 does he propose to say?

7 MR. FRIEDMAN: With regard to the document he  
8 will show, for instance, that the archival evidence shows  
9 that his files were not produced, although there were  
10 files produced of other individuals in the same archival  
11 area.

12 THE COURT: But -- okay. That's the first  
13 point. Okay. Let's discuss that. Why is that a trial  
14 issue and not a discovery issue?

15 MR. FRIEDMAN: It's a trial issue because the  
16 jury would then have knowledge of steps that were taken by  
17 the defendant to withhold or possibly destroy evidence  
18 which was important in the defense of the --

19 THE COURT: But isn't that a spoliation issue?

20 MR. FRIEDMAN: It is a spoliation issue, and it  
21 is also, in my opinion, an issue that the jury could  
22 consider. Where is the evidence that was there at the  
23 time that was material to the issues in the case that was  
24 asked for at the time of termination and is no longer  
25 there? And I -- my understanding is that that is an issue

1 that the jury could consider.

2 THE COURT: Are you asking for a negative  
3 inference?

4 MR. FRIEDMAN: Yes.

5 THE COURT: Isn't that a spoliation issue?

6 MR. FRIEDMAN: That is also a spoliation issue.  
7 Correct. But the jury, on its own, could draw negative  
8 inferences even without the Judge's ruling on that issue.  
9 That is my understanding. But there is one matter that is  
10 the foundation for this argument, and the matter is that  
11 there was an order issued requiring plaintiff to file a  
12 spoliation motion as of a particular date. And I'm not  
13 quite sure what that order was, and when it was issued.

14 THE COURT: We're not there yet.

15 MR. FRIEDMAN: Okay.

16 THE COURT: I want to start with the substance  
17 of this report and its purpose before we get to the  
18 timeliness and lateness issue. The most important issue  
19 to the Court now are the substantive issues. Why -- and I  
20 still don't have my arms around it, Mr. Friedman. This  
21 issue comes up frequently. The plaintiff says documents  
22 exist that should have been produced in discovery that  
23 weren't produced, so frequently spoliation motions are  
24 filed. I rule on them. Then we get to trial and you want  
25 to argue to the jury that there should be documents

1 produced that weren't produced, and you ask the Judge to  
2 give the jury a negative inference instruction. And  
3 that's up to the Judge to decide.

4 MR. FRIEDMAN: Not only that, but I could argue  
5 to the jury without having an instruction by the Judge.  
6 And my understanding of advocacy is that not every point  
7 that is raised before the jury is something to which a  
8 specific charge correlates.

9 THE COURT: So, you're proposing a trial within  
10 a trial? Not only is the jury going to evaluate the  
11 merits of your client's claim, but the jury also has to  
12 evaluate the spoliation issue?

13 MR. FRIEDMAN: No. We would be arguing to the  
14 jury based on the hard core facts the credibility of  
15 witnesses, the conduct of the parties, the presence or  
16 lack of presence of evidence in the face of being on  
17 notice. When Mr. Omogbehin was terminated, the day after  
18 he was terminated he had given a laundry list of specific  
19 items that he asked to be retained. And we would  
20 certainly argue that the absence of certain documents or  
21 electronic data is a significant factor.

22 For instance, and this would be part of our  
23 spoliation motion, the agency produced a back up tape  
24 claiming that the back up tape contained all of the  
25 historical information in electronic form. The back up

1 tape was dated April 22nd of 2004. Mr. Omogbehin was  
2 terminated on April 23rd. Now, there was significant e-  
3 mail information that he contended existed relating to his  
4 termination on the date of his termination. When he gave  
5 a list -- when he gave what was essentially a pro se  
6 litigation hold letter to the agency on April the 27th,  
7 which was the Monday after the Friday of his termination,  
8 or the Thursday of his termination, he specifically stated  
9 that he wanted the back up tape as of that date. The  
10 agency does not have that back up tape, which means that  
11 all of the valuable information on April 23rd, the date of  
12 his termination, is no longer in existence.

13                   THE COURT: What's on that tape that is so  
14 relevant to this case?

15                   MR. FRIEDMAN: Everything connected with the  
16 back and forth communications between agency personnel,  
17 human resources, the person who was involved in the actual  
18 termination decision of the questions why this was  
19 happening, and --

20                   THE COURT: Are those --

21                   MR. FRIEDMAN: -- whether it should have been  
22 pulled back.

23                   THE COURT: Are those e-mails with your client  
24 or internal e-mails of the defendant?

25                   MR. FRIEDMAN: These are internal e-mails of the

1 defendant.

2 THE COURT: Are you surmising that they exist?

3 MR. FRIEDMAN: Yes.

4 THE COURT: Or do you have evidence that they  
5 exist?

6 MR. FRIEDMAN: I --

7 THE COURT: The back up tape -- let's assume  
8 you're right, and I don't know if you are right. Let's  
9 assume for the sake of argument you're right. They didn't  
10 produce any e-mails, say, the week before your client was  
11 let go. Let's just assume for the sake of argument that's  
12 right. How do we know they existed at one time?

13 MR. FRIEDMAN: Because we have a history of e-  
14 mails up to the date of the termination, the consistent  
15 pattern of e-mails. And in addition to that we can show  
16 that the agency did, in fact, have the back up tape  
17 because when they gave us the CDs which purportedly  
18 contained everything on the April 22nd back up tape, there  
19 were e-mails for April the 23rd. There was a smattering  
20 of e-mails from April the 23rd showing that they could not  
21 have used the back up tape from April 22nd, which is what  
22 everyone represented they use in order to respond to  
23 discovery in order to create the --

24 THE COURT: So, let me ask you this, Mr.  
25 Friedman. You want to present this evidence to the jury

1 at trial? The jury is going to decide whether there was a  
2 proper termination of your client, and you're going to  
3 present all this evidence about all of these back up  
4 tapes, and deletions, and etcetera, etcetera, as part of  
5 the trial? That's what you're proposing?

6 MR. FRIEDMAN: Your Honor, I understand, and  
7 this was communicated with great clarity at the hearing of  
8 February the 21st of 2008. Ms. Shelton recently ordered a  
9 copy of that transcript. We also purchased a copy of the  
10 transcript. I believe the Court has it, but if not I  
11 would be happy to provide the Court with a copy. And in  
12 that hearing you made it clear that you wanted to get to  
13 the substance of the case. We're prepared with the  
14 substance of the case. We intend to file a motion for  
15 summary judgment based on the substance of the case on  
16 June 19th if that date still holds based on substance,  
17 based on facts, based on events, and in addition argue  
18 that the conduct of the agency suggests that the agency  
19 was intentionally withholding information that was  
20 critical to Mr. Omogbehin in addition to the substantive  
21 information which would support the fact that the --

22 THE COURT: That's a spoliation issue. Right?  
23 So, let's put aside the timeliness issue. Let's just put  
24 aside the timeliness issue for a second. Why shouldn't  
25 this Court order the plaintiff to file a spoliation

1 motion? I'll rule on the motion. I'll evaluate the  
2 arguments. I'll evaluate the law.

3 MR. FRIEDMAN: Okay.

4 THE COURT: I'll decide whether or not there's a  
5 negative inference or not.

6 MR. FRIEDMAN: Okay.

7 THE COURT: You want to appeal it, you'll appeal  
8 it, but then the issue doesn't come up at trial.

9 MR. FRIEDMAN: We would be happy to. And might  
10 I add, Ms. Shelton got involved in the case not at the  
11 outset, and at the February 21st, 2008 hearing you had  
12 asked whether the agency had supplied an image of his  
13 laptop. She said that she believed so. Upon -- and I'm  
14 conjecturing here because I got a letter from her dated  
15 May 6th of this year, just a few weeks ago, with a copy of  
16 a hard drive containing the mirror image because Mr.  
17 Omogbehin had never received a mirror image of his hard  
18 drive. There is an issue dealing with that, and that is  
19 the company that had been contracted to do the hard drive  
20 has a software program which, in order to read the hard  
21 drive which contains the mirror image either costs \$3,600  
22 to purchase or \$5,300 to purchase for Mr. Omogbehin. Mr.  
23 Omogbehin has stated that there's an extremely easy  
24 process, and a software --

25 MR. OMOGBEHIN: \$70.

1                   MR. FRIEDMAN: -- \$70 software program that can  
2 be used to obtain the mirror image of his laptop or  
3 desktop computer. And we were given a -- we were given a  
4 device, which it's a hardware device just a few weeks ago,  
5 and in order for us to even access the information on it  
6 he would be required to spend at least \$3,600 in order to  
7 get a software program.

8                   THE COURT: And you have an alternative that  
9 would only cost \$70?

10                  MR. FRIEDMAN: That is correct.

11                  THE COURT: And I have to tell you, Mr.  
12 Friedman, that if that is accurate I would be shocked if  
13 Ms. Shelton would not attempt to accommodate you. But  
14 have you raised this issue with her before?

15                  MR. FRIEDMAN: No, I did not, and I apologize to  
16 Ms. Shelton. When I got here we had discussed one other  
17 issue and that was the second issue that I intended to  
18 discuss with her, and I went off to talk to my client  
19 about the issues --

20                  THE COURT: Mr. Friedman, if I look at Page 19  
21 of your expert report it appears to the Court that the  
22 penultimate conclusion of your client is that, "defendant  
23 engaged in willful and deliberate spoliation of evidence."

24                  MR. FRIEDMAN: Yes.

25                  THE COURT: That's what you want your client to

1 opine at trial, right?

2 MR. FRIEDMAN: No. No. That is not what I  
3 want, and I apologize, I did not write the report. He  
4 did. I had indicated to him that he needed to identify  
5 the areas of expertise, and what disciplines he would be  
6 applying. That -- what he has is something that a lawyer  
7 arguing to a Judge or a jury would be doing. His only  
8 purpose is to be able to interpret the electronic data,  
9 and then it's up to a lawyer to fashion whatever  
10 information comes from him to reach the conclusion that  
11 there was an intentional -- there were intentional acts  
12 designed to destroy or withhold evidence, or that based on  
13 his interpretation of the electronic data that the jury  
14 can understand the sequencing of events and the  
15 communications between people and when they occurred.

16 THE COURT: And that's all for the ultimate  
17 purpose of you arguing to the jury that the jury should  
18 infer that relevant evidence was destroyed?

19 MR. FRIEDMAN: My argument would be that the  
20 agency discriminated against Mr. Omogbehin, and in  
21 fashioning that argument I would list a number of factors,  
22 substantive factors, factors relating to the conduct of  
23 the parties. I mean, it's a whole host of things.

24 THE COURT: Okay.

25 MR. FRIEDMAN: But the ultimate burden is to

1 argue that there was a discriminatory termination.

2 THE COURT: Absolutely. No one has any argument  
3 about that. But what we're talking about is your client  
4 is going to -- you propose that your client testify at  
5 trial that the back up tape was destroyed, and we know it  
6 existed because we have this printout of this data? I'm  
7 just very perplexed by that.

8 MR. FRIEDMAN: Okay. Well, that is going to be  
9 straightforward testimony. The jury would be presented  
10 with facts that after his termination he gave a litigation  
11 hold letter.

12 THE COURT: Okay.

13 MR. FRIEDMAN: The litigation hold letter  
14 identified certain items.

15 THE COURT: I'm with you.

16 MR. FRIEDMAN: And that there had been  
17 communications by and between various agency personnel up  
18 to the date that they provided us with information, and  
19 that there is an absence of information which the  
20 plaintiff had requested.

21 THE COURT: So, why do you need an expert for  
22 that?

23 MR. FRIEDMAN: Well, no. That is -- you are  
24 right. And I told Mr. Omogbehin that you don't need an  
25 expert for the spoliation issue dealing with the fact that

1 he requested a tape on a particular date. But you -- to  
2 err on the side of caution I had wanted to identify him as  
3 an expert in areas of mirror images, although I believe  
4 that that will be resolved with Ms. Shelton. But he at  
5 least has to explain to the jury what a mirror image is.  
6 And since he's an IT expert --

7 THE COURT: Why does that mirror image issue --  
8 why is that relevant to the case, this mirror image issue?

9 MR. FRIEDMAN: Because the whole case  
10 encompasses electronic communications. He was the IT  
11 expert. Everything was done via e-mail.

12 THE COURT: But listen, Mr. Friedman, your  
13 client gets up on the stand and says I sent the litigation  
14 hold the day after I was fired. There should have been --  
15 we know there was a history of e-mail communications  
16 amongst the defendants. I did not get any of those e-  
17 mails, period. Why does he have to get into mirror image  
18 issues?

19 MR. FRIEDMAN: Because it's more than --

20 THE COURT: Those are facts. Those are facts.

21 MR. FRIEDMAN: There is no question about that.  
22 But he has to show, for instance, that when an agency  
23 makes an allegation that Mr. Omogbehin did not participate  
24 in the creation of a document which supposedly was  
25 essential, and he has information in the electronic file

1 showing that he was the author of that document, and that  
2 he made revisions and he e-mailed that --

3 THE COURT: That's a different issue. That is  
4 different than spoliation.

5 MR. FRIEDMAN: That is true. But in order for  
6 him to present to a jury the sequencing of events he has  
7 to get into issues such as metadata.

8 THE COURT: Okay, Mr. Friedman, maybe I'm  
9 starting to understand what you're saying a little bit.  
10 On the one hand we have the spoliation issue. That's what  
11 your client talks about on Page 19, that the defendant  
12 engaged in willful and deliberation spoliation of  
13 evidence, destruction of evidence. But now, if one of the  
14 fact issues in the case is whether or not your client  
15 worked on a particular document, and the defendant says no  
16 and you say yes, and your expert, by looking at the data,  
17 can give an opinion that this evidence is that I worked on  
18 it, that's a different issue. That's not a spoliation  
19 issue.

20 MR. FRIEDMAN: You are correct. And what I was  
21 explaining to you is why he would be testified as an  
22 expert and what his importance is.

23 THE COURT: But then what we need to do is we  
24 need to clarify precisely what opinions your client  
25 proposes to give at trial because in this report, as I

1 read it, you can -- if you want to show me something else,  
2 okay, I turn to the conclusion section, the only  
3 conclusion is that there was destruction of relevant  
4 evidence. That's a spoliation issue. It seems to the  
5 Court that that should be dealt with on a motion. But if  
6 your client wants to give an opinion that I'm analyzing  
7 this electronic data and because of my expertise I can  
8 show why there's evidence that I worked on it contrary to  
9 the defendants, that's a different story.

10 MR. FRIEDMAN: That is correct.

11 THE COURT: So, we need to identify what's  
12 spoliation and what's, you know, the classic opinion  
13 testimony. Okay. Let's stop there and let's now turn to  
14 Ms. Shelton and see what some of her thoughts are as to  
15 what we'll be hearing from Mr. Friedman.

16 MS. SHELTON: Your Honor, there are a lot of  
17 issues raised that I would like to address. I'm trying to  
18 determine what would be the most appropriate to address  
19 first. I would agree that a motion for spoliation would  
20 be appropriate in this case. I would also take issue with  
21 plaintiff's counsel that he would be able to argue to the  
22 jury that relevant evidence was destroyed without this  
23 Court having made that finding first --

24 THE COURT: Okay. I understand that.

25 MR. SHELTON: -- because he has to show,

1 obviously, more than he asked for things and they weren't  
2 given to him in order to get that inference, in order to  
3 talk to the jury about that. He has to show more than  
4 that.

5 THE COURT: That's an interesting issue you  
6 raise, Ms. Shelton, and this Court is not going to decide  
7 that.

8 MS. SHELTON: That's fine. That was on  
9 spoliation --

10 THE COURT: I wonder if there's a difference  
11 between that -- I don't know the answer to this. I wonder  
12 if there's a difference between getting a negative  
13 inference instruction at trial and the plaintiff getting  
14 up on the stand at trial and saying I don't have any e-  
15 mails from Mr. X, Y, Z or Ms. X, Y, Z the week before I  
16 was fired. Draw your own conclusions from that.

17 MS. SHELTON: I would argue a couple of points  
18 to that, Your Honor. I would move to strike any testimony  
19 regarding that where this Court has specifically ruled  
20 that plaintiff has received all the e-mails in this case,  
21 both on the motion to compel and on the motion for  
22 reconsideration. And I'm prepared to go into the minutiae  
23 of that right now, and bring it up again if we need it.

24 THE COURT: I don't think this is the  
25 appropriate time to decide --

1 MS. SHELTON: Okay.

2 THE COURT: -- the merits of those issues.

3 MS. SHELTON: But on that basis that's why I  
4 would prefer that the spoliation motion be briefed so that  
5 I have that opportunity to argue it, and if this is still  
6 an issue even after our motion for spoliation I would move  
7 to strike any testimony about that --

8 THE COURT: Okay.

9 MS. SHELTON: -- because I believe that there  
10 has been a finding of this Court that we have produced the  
11 e-mails that he's seeking, and that it would be  
12 prejudicial to the defendant for him to argue essentially  
13 a de facto spoliation inference where the Court has found  
14 otherwise.

15 THE COURT: And Judge Irenas is going to decide  
16 the trial issue. But, Mr. Friedman, can you answer this  
17 question? Are you taking the position that there should  
18 be a negative inference at trial because of the  
19 destruction of evidence?

20 MR. FRIEDMAN: That is the ultimate aim of a  
21 spoliation motion. Now --

22 THE COURT: Can you answer my question? That's  
23 what I want to know because --

24 MR. FRIEDMAN: Okay.

25 THE COURT: -- if that is what you want, I'm

1 going to order that you file a spoliation motion and I'm  
2 going to decide that issue. And you can do with that  
3 ruling what you want. If you want a negative inference  
4 because of the destruction of discovery, that's a  
5 spoliation motion. That should be filed. I know there  
6 was -- there may or may not have been a prior deadline.  
7 If you want that negative inference I'm going to give you  
8 leave to file that motion. I'm going to decide that  
9 issue. Is that what you want at trial, a negative  
10 inference because of -- do you want the Judge to instruct  
11 the jury on this negative inference because of the  
12 destruction of relevant evidence?

13 MR. FRIEDMAN: Yes, of course, as an advocate,  
14 any advocate in the position that I'm in would.

15 THE COURT: Then I'm going to order you to file  
16 -- we'll talk about timing, but I'm going to order you to  
17 file a spoliation motion and I'm going to decide the  
18 issue. And then what you do with that issue is up to you.  
19 If you appeal it, and how Judge -- if it's not appealed  
20 how Judge Irenas uses it at trial is up to him.

21 MR. FRIEDMAN: Your Honor, I understand, and you  
22 keep -- you're making me kind of queasy when you said that  
23 I can appeal it, the inference being the agency can feel  
24 comfortable in your ruling but I may want to appeal.

25 THE COURT: Of course not.

1 MR. FRIEDMAN: Okay.

2 THE COURT: I haven't even seen the evidence  
3 yet.

4 MR. FRIEDMAN: Okay. But I --

5 THE COURT: Of course not, Mr. Friedman.

6 MR. FRIEDMAN: -- mean, it's, like, the second  
7 or third time that you had mentioned that plaintiff can  
8 appeal it, and it makes me --

9 THE COURT: Defendant can appeal it, too. Of  
10 course, Mr. Friedman.

11 MR. FRIEDMAN: Okay.

12 THE COURT: I have to see the evidence. I have  
13 to see the arguments.

14 MR. FRIEDMAN: Yes.

15 THE COURT: I --

16 MR. FRIEDMAN: The --

17 THE COURT: If I gave you that impression, Mr.  
18 Friedman, it was the wrong one. I specifically said to  
19 Ms. Shelton I'm not addressing the merits of the issues  
20 today

21 MR. FRIEDMAN: The evidence will be crystal  
22 clear, and -- crystal clear from the plaintiff's  
23 perspective and also apparently from the defendant's  
24 perspective.

25 THE COURT: But this is what I think you need to

1 do, Mr. Friedman. I think you need to revise your expert  
2 report, because as framed now it's only a spoliation  
3 expert report. If you want to have some other issue for  
4 trial, you ought to clarify that.

5 MR. FRIEDMAN: All right.

6 MS. SHELTON: Your Honor, do I take it that  
7 you're giving him leave to file an amended expert report?

8 THE COURT: Yes, I am doing that because we have  
9 to get to the bottom of this, and I want to straighten  
10 this out before this case goes to Judge Irenas before  
11 trial. It appears that it was Mr. Friedman's intent and  
12 plaintiff's intent to address a non-spoliation issue. For  
13 all I know, Ms. Shelton, it may already be in here. I  
14 don't know.

15 MS. SHELTON: Your Honor, to that point there  
16 was some discussion between plaintiff's counsel and the  
17 Court about what he calls a substantive matter in the  
18 case, saying that, you know, there was a document that he  
19 say he did work on, that he could show that he worked on,  
20 that doesn't come up anywhere in this expert's report at  
21 all. I mean, the substance of this expert's report --

22 THE COURT: Is that an issue you want to raise?

23 MR. FRIEDMAN: That was used as an example just  
24 as we would use as an example of the fact that the  
25 terminating official indicated that she worked on

1 documents and that she created documents on her own  
2 without the input of the plaintiff or others. We are not  
3 committing ourselves to specific facts. There are a  
4 number of facts which we will lay out in our motion, in  
5 our statement of facts, in our pretrial submission. This  
6 case has a long history. It went through the  
7 administrative process. There were three days of  
8 administrative hearing. There is an extensive record.  
9 There was extensive discovery, and extensive -- at the  
10 administrative level it was limited. There was extensive  
11 discovery, as you well know, here, and there have been a  
12 lot of controversies as a result of the discovery at the  
13 Court level.

14 MS. SHELTON: Your Honor, I hesitate because I'm  
15 afraid what I'm going to say a spoliation is what we could  
16 or should have done in the administrative proceeding,  
17 which frankly shouldn't be a part of this case. This is a  
18 rehash of whatever discovery disputes he had at the  
19 administrative level. I can't really speak to that, Your  
20 Honor. I can address what was requested of us here, and  
21 what I've turned over and what I haven't turned over. You  
22 know, I don't -- I just -- my warning flag goes up when he  
23 talks about the extensive discovery disputes at the  
24 administrative level because I'm afraid what's going to  
25 happen here is that it's going to devolve into a dispute

1 about what was or wasn't done at the administrative level.

2 MR. FRIEDMAN: Your Honor, you gave plaintiff  
3 leave of Court in order to conduct discovery at its own  
4 expense, and it was at a considerable expense, in order to  
5 determine whether the back up tapes that had been  
6 represented placed on CDs contained all of the  
7 information. During that discovery process I questioned  
8 the agency counsel at the administrative proceedings, Jay  
9 Fox, and I have on the record specific information  
10 relating to the information that he acknowledges had been  
11 requested at the administrative level. This is a de novo  
12 proceedings. At the administrative level there are strict  
13 time frames. The Administrative Judges, the EEOC, decide  
14 cases on a pretty prompt basis and there is not extensive  
15 discovery in the EEO process. But this is a de novo  
16 proceeding.

17 THE COURT: You can sit down, counsel. I've  
18 heard enough on this issue and the Court is prepared to  
19 rule on the issue. With regard to the timing issue the  
20 Court overrules the defendant's objection. At most the  
21 report was filed a day or two or three late. There was no  
22 prejudice, and so we're not going to bar the report on the  
23 grounds of timeliness.

24 I am going to retract a statement I just made.  
25 I am not granting plaintiff leave to submit a new expert

1 report. By June 15th plaintiff is ordered to file a  
2 spoliation motion. If plaintiff is arguing that there  
3 should be a negative inference or any type of inference at  
4 trial that relevant evidence was destroyed, that has to be  
5 addressed in plaintiff's spoliation motion to be filed by  
6 June 15th. In connection with that motion if plaintiff  
7 wants to rely upon its expert report, it's free to do  
8 that. If plaintiff wants to clarify the statements in the  
9 expert report it already submitted, it's granted leave to  
10 do that. Plaintiff is not granted leave to supply any new  
11 opinions that are not already expressed in the expert  
12 report that was submitted by the Court's deadline. So, if  
13 the issue that you talked about, Mr. Friedman, was not  
14 addressed in this report, the Court will not permit that  
15 to be addressed in a new, amended expert report. But that  
16 being said, Mr. Friedman, I'm not ruling on whether or not  
17 that's an expert or a fact issue. You can address that  
18 issue with Judge Irenas at trial. It may be that Judge  
19 Irenas could determine that that's not an expert opinion.  
20 That's up to him to decide.

21 MR. FRIEDMAN: And, Your Honor, if I may? The  
22 purpose of identifying Mr. Omogbehin was a witness is to  
23 explain IT principles to a jury so that the jury would  
24 have an understanding, and that's why it was important for  
25 him to be qualified as an expert in this case.

1           MS. SHELTON: Your Honor, I just want to make  
2 sure that I understand and I clarify what I'm going to --  
3 what's going to be at issue here. Plaintiff is going to  
4 file a spoliation motion, and this expert opinion can  
5 support that motion for spoliation?

6           THE COURT: Correct.

7           MS. SHELTON: Okay. Has the Court made any  
8 ruling with whether or not to accept this expert's report  
9 for the purposes of trial?

10          THE COURT: No.

11          MS. SHELTON: Okay.

12          THE COURT: That's not for this Court, Ms.  
13 Shelton. That will be Judge Irenas.

14          MS. SHELTON: Okay.

15          THE COURT: I'll decide whether to use the  
16 report for purposes of the spoliation motion.

17          MS. SHELTON: Okay. So, the report may be  
18 amended or clarified as it relates to spoliation issues?

19          THE COURT: As it relates to --

20          MS. SHELTON: -- for the spoliation motion?

21          THE COURT: The report may be clarified in any  
22 manner so long as it only addresses the issues that are  
23 already contained in this report. I don't know if this  
24 report contains anything in it relevant to an issue other  
25 than spoliation. I don't know. I didn't study it in

1 detail. If it only addresses spoliation, then that's the  
2 only issue that can be clarified.

3 MS. SHELTON: And also to clarify, Your Honor,  
4 if plaintiff does ultimately amend or clarify this  
5 expert's report with respect to what's already in it, will  
6 that then be the expert's report that would be considered  
7 --

8 THE COURT: For trial.

9 MS. SHELTON: -- by Judge Irenas?

10 THE COURT: Yes. So long as it only clarifies  
11 what's in the original report. I am not granting any  
12 substantive amendments of the expert report. For example,  
13 if plaintiff wants to bring up a new issue that is not  
14 already addressed in this report, I'm not granting  
15 plaintiff leave to do that. Time has passed. You've had  
16 enough chances. But if there's a particular statement in  
17 here that needs to be clarified because it's ambiguous,  
18 plaintiff is granted leave to do that.

19 MS. SHELTON: And Your Honor will be determining  
20 the motion for spoliation?

21 THE COURT: Yes.

22 MS. SHELTON: And after the motion for  
23 spoliation is determined will there be any further rulings  
24 regarding what's left in this expert report? Or is that  
25 an application that I would make to Judge Irenas?

1           THE COURT: That might be an application -- I  
2 don't know. We'll have to cross that bridge when we come  
3 to it, Ms. Shelton. My instinct tells me that ultimately  
4 that's going to be Judge Irenas's call, ultimately.

5           MS. SHELTON: I just wanted to be clear because  
6 I think we may be back again as to what happens with this  
7 expert's report --

8           THE COURT: Right.

9           MS. SHELTON: -- if anything, after the motion  
10 for spoliation --

11          THE COURT: But I envision happening is, and I  
12 anticipated this, and correct me if I'm wrong, Mr.  
13 Friedman, because I anticipated that when dispositive  
14 motions are filed you would raise a spoliation issue.  
15 That's why I want to get the spoliation issue resolved and  
16 decided before the dispositive motions are filed one way  
17 or the other.

18          MS. SHELTON: That would raise my next point,  
19 Your Honor. Will there be an extension to the summary  
20 judgment briefing schedule?

21          THE COURT: Yes. Yes. The summary judgment  
22 briefs will not be due until after the spoliation motion  
23 is decided.

24          MS. SHELTON: And you'll issue a date after  
25 that?

1           THE COURT: Absolutely.

2           MS. SHELTON: Okay.

3           THE COURT: Because I'm concerned that if you  
4 file your -- if you file your summary judgment motions now  
5 and plaintiff argues for a spoliation inference, and I  
6 haven't yet decided the spoliation motion, well, what's  
7 the good of the motion? That's why I want to do that  
8 issue first.

9           MS. SHELTON: I understand, Your Honor. I  
10 believe there was another issue to be addressed which was  
11 the mirror imaging of plaintiff -- plaintiff's counsel has  
12 represented that this expert's report speaks to mirror  
13 imaging and metadata and that he needs to explain these  
14 things to the Court, and I believe -- we've talked. There  
15 might be some resolution of this mirror imaging issue. I  
16 don't want to have to come back here again about this, so  
17 I want to try and flesh this out to whatever is out there.

18           Plaintiff's expert report identified  
19 specifically a type of software program that would be used  
20 to make a mirror image. As part of his opinion, that  
21 mirror image was not produced. When I contracted with an  
22 outside computer forensics firm and said, look, whatever  
23 we tried to do before apparently wasn't right, can you  
24 please do this? They created a mirror image, and I asked  
25 them to use the software that the plaintiff stated he was

1 familiar with and that he was -- he is holding himself out  
2 as an expert, not in IT, in computer forensics in this  
3 report, and he's identified specifically software programs  
4 that he was familiar with that could and should have been  
5 used to create this mirror image, and now that defendant  
6 has done exactly that, created the mirror image with this  
7 software that he claims as a computer forensics expert to  
8 be familiar with, he's now telling me that he can't access  
9 it, and it's going to cost too much money. I would have  
10 thought this was software he already had if he was  
11 familiar with it enough to hold himself out as an expert  
12 in this matter. And now he's telling me no, no, no, we  
13 don't want it in this format, we want it through something  
14 else. I don't know what that is, but I'm afraid to leave  
15 this courtroom and find out later that it's something that  
16 -- who knows what will happen. Sort of -- I don't know,  
17 but I -- I'd like to flesh this out if we can.

18 THE COURT: This is what Mr. Friedman  
19 represented would cost \$75?

20 MS. SHELTON: Yes, Your Honor.

21 THE COURT: Can you help us, Mr. Friedman?

22 MR. FRIEDMAN: Yes. I know that Ms. Shelton  
23 made representations as to the specific software program  
24 that Mr. Omogbehin stated should be used. I am not sure  
25 what she is referring to. I can refer the Court to Page 5

1 of the report, the last paragraph, in which Mr. Omogbehin  
2 states that mirror images can be created using various  
3 techniques and software programs. He certainly didn't  
4 direct the Government to use a particular software program  
5 that costs \$3,600 or \$5,300 to purchase, and we're not  
6 sure --

7 THE COURT: Who paid for that? The Government?  
8 MS. SHELTON: Your Honor, I paid to have the  
9 mirror imaging done.

10 THE COURT: And it cost \$3,500?

11 MS. SHELTON: No. This is -- Your Honor, my  
12 computer forensics expert is going to cost me quite more  
13 than that. But what plaintiff has represented to the  
14 Court is that in order for his client to read the data  
15 that we've now provided him he needs to purchase software,  
16 which frankly, as a computer forensics expert that he's  
17 holding himself out to be I would have thought he had.

18 THE COURT: Well, the plaintiff is going to have  
19 to purchase this \$75 software. Why should the defendant  
20 pay for it if they've already mirror imaged it?

21 MR. FRIEDMAN: That is not a problem provided  
22 the Government gives him access to the laptop so that he  
23 can create his own mirror image.

24 MS. SHELTON: Your Honor, this was addressed  
25 very directly in the motion to compel and the motion for

1 reconsideration. If we produce a mirror image we were not  
2 required to produce the actual laptop. The Court has  
3 already ruled on that and I would object to giving the  
4 laptop to plaintiff. I thought what I was going to hear  
5 from plaintiff's counsel is some direction about what my  
6 computer forensics guy should have done that would only  
7 take \$70 to read. I don't --

8 THE COURT: Let me ask you this. I --

9 MS. SHELTON: I mean, if that's the question,  
10 Your Honor --

11 THE COURT: Ms. Shelton, I think counsel needs  
12 to discuss this issue. If it's -- and I don't understand  
13 the issue yet. If it's a simple matter, Ms. Shelton, of  
14 your custodian making available this laptop in a  
15 conference room while you're present and your custodian is  
16 present, plaintiff comes to your conference room, plugs  
17 something in while you're watching everything that's done  
18 with no danger or risk that the data is going to be  
19 irretrievably lost, why can't we do that?

20 MS. SHELTON: Because, Your Honor, I'm not an IT  
21 expert and I would not be competent to say whether or not  
22 he had handled the matter properly. I am certainly  
23 willing to allow a third party to do this, but not to let  
24 the plaintiff himself. It frankly wouldn't be  
25 appropriate. Second of all, I'm not in a position to say

1 whether or not he's doing the mirror imaging without  
2 writing over or doing something else to it, which is why I  
3 contracted a third party to do it. Now, if there is a way  
4 for the third party to do what plaintiff is proposing to  
5 do, tell me what you want him to do and I will ask if  
6 that's something he can do now that I've spent the expense  
7 of the other production --

8 THE COURT: Can that be done?

9 MR. FRIEDMAN: There is a way, then --

10 MS. SHELTON: What is the way?

11 MR. FRIEDMAN: To have any number --

12 THE COURT: Let's hear from -- do you mind if we  
13 hear from your client, because he's the quote, unquote,  
14 expert?

15 MR. FRIEDMAN: Yes.

16 THE COURT: What has to be done?

17 MR. OMOGBEHIN: There is a very simple software  
18 that can be used. It's called Norton Ghost.

19 THE COURT: Do you load it onto the laptop?

20 MR. OMOGBEHIN: You load it onto your laptop.

21 THE COURT: And then what happens?

22 MR. OMOGBEHIN: You can attach an external  
23 storage just like the one that they gave to us. You can  
24 attach it to that laptop and then you just tell that  
25 software to copy the e-mails of that laptop onto that

1 external storage. This process takes about 45 minutes.

2 It doesn't take more than that. That is it, Your Honor.

3 THE COURT: Can Ms. Shelton's expert do this?

4 MR. OMOGBEHIN: Absolutely. Yes.

5 THE COURT: Can you give her the software that  
6 you'd need?

7 MR. OMOGBEHIN: Absolutely.

8 THE COURT: Can you do that? I'm ordering you  
9 to do that, Ms. Shelton, ask your expert to spend 45  
10 minutes to copy this.

11 MS. SHELTON: Can you tell me the name of the  
12 software again?

13 MR. OMOGBEHIN: Norton Ghost.

14 THE COURT: Is there a version?

15 MR. OMOGBEHIN: The latest version, six point -  
16 - or 5.0.

17 THE COURT: Can I ask, if it's such a simple  
18 process why didn't you raise this before?

19 MR. OMOGBEHIN: I did, Your Honor, but they  
20 didn't want to produce it. They said you'll have to use  
21 your own expert person. So, I just let it go. And I told  
22 them it was a very simple process. It takes -- it's about  
23 \$70 software, and it's about -- it takes about 45 minutes  
24 of copying, ghosting of the entire e-mail.

25 THE COURT: And you put it on one of these

1 portable discs?

2 MR. OMOGBEHIN: Yes, you can, Your Honor.

3 MS. SHELTON: Your Honor, I'm going to call my  
4 expert when I get out of here and ask him if he's got  
5 Norton Ghost. If they've got Norton Ghost I will ask him  
6 to make another image.

7 THE COURT: Thank you, Ms. Shelton. If there's  
8 any problem let the Court know and we'll address this. It  
9 seems like there should be a simple way to address this.

10 MS. SHELTON: And, Your Honor, just assuming  
11 that this is resolved and that a mirror image to  
12 plaintiff's satisfaction is produced by the defendant,  
13 then what happens to the information in the expert's  
14 report regarding the fact that we have not mirror imaged  
15 or that we haven't provided a mirror image?

16 THE COURT: I assume it becomes moot.

17 MS. SHELTON: Okay. And I believe this is  
18 something that I would address -- I mean, it begs the  
19 question, then, there would need to be an amendment or a  
20 striking of this from the report prior to its submission  
21 to anybody that's going to consider it?

22 THE COURT: I would assume so --

23 MS. SHELTON: Okay.

24 THE COURT: -- if that's the case. This is  
25 where we are, counsel. Plaintiff is filing a spoliation

1 motion by June 15th. It seems to the Court, Ms. Shelton,  
2 that this is a complex issue that is going to take you  
3 some time to respond to, that's what I anticipate, and  
4 you'll need to consult with your expert. Do you think it  
5 will take you more than 30 days, or would you prefer 45  
6 days?

7 MS. SHELTON: Your Honor, only due to other  
8 depositions, commitments I have in June, 45 would be  
9 preferable.

10 THE COURT: The Court believes there's good  
11 cause to do that given the complexity of the issue, so  
12 plaintiff's -- defendant's response will be due July 31st,  
13 and the Court -- you don't have to file a separate motion  
14 on this, Mr. Friedman, the Court is granting you leave to  
15 file a reply brief to defendant's opposition, and that  
16 will be due by August 17th.

17 I regret that this is dragging out as long as it  
18 is, but it's an important issue. And we'll schedule oral  
19 argument in early September. After that issue is decided  
20 I will give the parties a deadline to file dispositive  
21 motions.

22 Let's sum up the Court's rulings. The motion  
23 that the expert -- the request that the expert report be  
24 stricken because it was untimely is denied. Plaintiff  
25 shall file the spoliation motion by June 15th. The

1 response is due by July 31st. Plaintiff's reply is due by  
2 August 17th. The Court will schedule oral argument.  
3 Plaintiff, in a request to amend -- substantively amend or  
4 supplement the expert report is denied. The case has been  
5 going on for quite some time and there's no good cause to  
6 raise an issue that has not already been raised. However,  
7 plaintiff is granted leave to clarify any of the existing  
8 opinions expressed in the expert report that has already  
9 been served.

10 If defendant objects that a quote, unquote  
11 clarification is not in fact that but is instead a  
12 substantive issue, raise that objection, Ms. Shelton, and  
13 the Court will deal with it. If the Court determines that  
14 it's a substantive amendment it will be stricken for lack  
15 of good cause. If it's simply a clarification of a point  
16 that was already made, the application to strike it will  
17 be denied.

18 Mr. Friedman, do you have any other issues you'd  
19 like to address with the Court?

20 MR. FRIEDMAN: Just one brief issue. At the  
21 time fact discovery had ended previously, the agency  
22 supplied supplement -- the initial disclosures. And they  
23 identified documents that Mr. Omogbehin in his litigation  
24 hold letter had requested at the time of his termination,  
25 that being all of the documents and electronic data that

1 were in his office. The agency has represented that those  
2 are in safe keeping. They are boxed up. And we do have  
3 arrangements now for Mr. Omogbehin to go through all of  
4 those materials. It will probably be next week, and I  
5 just --

6 THE COURT: Are these personal papers or work  
7 related papers?

8 MR. FRIEDMAN: Work related papers.

9 THE COURT: Okay. That's fine. That's  
10 perfectly reasonable. If the defendant has satisfied its  
11 duty under Rule 26(e) to supplement you clearly have a  
12 right to review those documents. There's no question  
13 about that, Mr. Friedman.

14 MR. FRIEDMAN: I just wanted to bring that to  
15 the Court's attention.

16 THE COURT: Thank you. I think counsel is able  
17 to work through that. Okay. It appears that there's no  
18 other issues from the plaintiff. Ms. Shelton, any issues  
19 from the defendant?

20 MS. SHELTON: Not that I can think of, Your  
21 Honor.

22 THE COURT: Thank you, counsel, for your  
23 argument. I think we now have a game plan to proceed with  
24 this case, and we're adjourned. I'll enter an appropriate  
25 order just confirming these rulings, and we're adjourned.

1

\* \* \* \* \*

C E R T I F I C A T I O N

I, TAMMY DeRISI, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter to the best of my ability.

/s/ Tammy DeRisi Date: July 20, 2009  
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